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Citation for published version:

Morgera, E 2012, European Environmental Law. in S Alam, JH Bhuiyan, TMR Chowdhury & EJ Techera (eds), *Routledge Handbook of International Environmental Law*. Routledge, pp. 427-42.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Routledge Handbook of International Environmental Law

Publisher Rights Statement:

© Morgera, E. (2012). European Environmental Law. In S. Alam, J. H. Bhuiyan, T. M. R. Chowdhury, & E. J. Techera (Eds.), *Routledge Handbook of International Environmental Law*. (pp. 427-42). Routledge.

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University of Edinburgh

School of Law

Working Paper Series

No 2010/37

Introduction to European Environmental Law from an International Environmental Law Perspective

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To be published in a shorter version as

E Morgera, "European Environmental Law" in Alam et al (eds), Routledge
Handbook of International Environmental Law (Routledge, forth. 2012)



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Edinburgh School of Law Working Paper Series

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Electronic copy available at: <http://ssrn.com/abstract=1711372>

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Abstract

This contribution illustrates the development of the environmental law of the EU from an international environmental law perspective. It highlights the external and internal dimensions of EU environmental law and their interaction. It also outlines the role of the EU institutions in the development and implementation of EU environmental law, as well as the objectives and principles of the EU environmental law, focusing specifically on environmental integration and sustainable development. It concludes by pointing to some of the present challenges facing EU environmental law.

Keywords

EU environmental law; international environmental law; environmental integration; sustainable development

An introduction to European Environmental Law from an International Environmental Law Perspective

Dr. Elisa Morgera*

1. The relevance of EU Environmental Law from an international law perspective

There are several reasons why the environmental law of the European Union (EU) makes an interesting topic for international environmental lawyers. First of all, the EU is a prominent international actor, proactively engaged in the development and implementation of international environmental law. The EU is a party to over 40 multilateral environmental agreements (MEAs).¹ This has required changes in the process of international law-making and implementation, to enable the EU as a Regional Economic Integration Organization² to participate more effectively in international fora, possibly paving the way for other regional organizations to do so in the future. In addition, EU environmental law is the most sophisticated example of a regional regime of international environmental law, that can be of inspiration (in its successes and shortcomings) to other regions establishing free trade agreements.³

Within MEAs and related international processes the EU in practice makes a powerful negotiating block, speaking on behalf of its 27 Member States and often of other associated countries⁴ and representing the largest provider of official development aid and contributions to UN budgets.⁵ Thus, the EU uses its external policies at the multilateral level to increase its influence over the making of international law and policies of international organizations (a phenomenon called “EU international law

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¹ For an official list of Multilateral Environmental Agreements signed by the EU (although updated to 2006), see European Commission, “Multilateral Environmental Agreements to which the EC is a Contracting Party or a Signatory”, http://ec.europa.eu/environment/international_issues/pdf/agreements_en.pdf (all web sources cited in this contribution have been last consulted on 6 August 2010). The most notable case of an MEA to which the EU is not a party is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The EU has adopted unilateral and more stringent legislation on trade in endangered species, while the Gaborone Amendment to CITES (adopted in 1983) that would permit membership by REIOs has not yet entered into force (see CITES, “Gaborone Amendment,” <http://www.cites.org/eng/disc/gaborone.shtml>).

² Ludwig Kramer, “Regional Economic International Organizations: The European Union as an Example”, in *The Oxford Handbook of International Environmental Law*, eds. Daniel Bodanski et al. (Oxford: Oxford University Press, 2007), 853-876.

³ Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003), 733.

⁴ For instance, at the UN World Summit the EU spoke on behalf of 36 countries – see Elisa Morgera and Gracia Marín Durán, “The UN 2005 World Summit, the Environment and the EU: Priorities, Promises and Prospects,” *RECIEL* 15 (2006): 1-18.

⁵ The EU and its member States collectively account for 55% of the world’s official development assistance (ODA), and the provider of 38% of the UN regular budget and 50% of voluntary contributions to UN funds and programmes (Commission, ‘Communication on a twelve-point EU action plan in support of the millennium development goals’ COM (2010) 159 final; and EU@ the UN website, ‘Overview: European Union at the UN’, at http://www.europa-eu-un.org/articles/articleslist_s88_en.htm).

practice”).⁶ Furthermore, international environmental law plays a significant role in the bilateral and unilateral external action of the EU, both in its development cooperation and in its political and economic cooperation with neighbouring countries and distant emerging economies.⁷ Significantly, attempts to influence international environmental law by the EU are not confined to its (multilateral or bilateral) external action. The EU is also, at least on some occasions, using its ‘domestic’ law-making powers to inspire the development of international environmental law: the most notable case is that of the EU Climate and Energy Package adopted in 2009, which anticipates agreement on a future international climate change regime.⁸

Furthermore, as a “new legal order of international law” that imposes obligations and confers rights not only on States but also on their nationals,⁹ EU environmental law provides additional legal means to ensure prompt and effective implementation of international environmental law at the EU and Member State level (a phenomenon called “Europeanization of international law”).¹⁰ By becoming part of the EU legal order, international environmental law acquires primacy over conflicting provisions of national law of the EU Member States. In addition, national courts are obliged to interpret provisions of national law in conformity with Europeanized international environmental norms. Equally, EU law itself is to be interpreted in conformity with international environmental instruments to which the EU is a party, so that international environmental instruments and norms can be used in principle to control the validity of EU norms. In addition, enforcement of international environmental law, once included in the EU legal order, can be ensured through the EU-level enforcement procedure against Member States that either do not transpose or fail to actually apply and enforce international treaties concluded by the EU (this may also lead to the imposition of financial penalties). Action for damages brought by individuals against the EU or against Member State authorities for breaches of Europeanized international environmental norms is also in principle possible.¹¹

From a comparative perspective, EU Environmental Law is not only significantly influencing the development of national environmental law in the EU Member States,¹² but also national law beyond its borders: countries in the process of acceding

⁶ Jan Wouters et al., Introduction to *The Europeanization of International Law: The Status of International Law in the EU and its Member States* (The Hague: TMC Asser Press, 2008), 7.

⁷ Gracia Marín Durán and Elisa Morgera, “Towards Environmental Integration in EC External Relations? A Comparative Analysis of Selected Association Agreements,” *Yearbook of European Environmental Law* 6 (2006): 179-210.

⁸ Hans Vedder, “Diplomacy by Directive: An Analysis of the International Context of the Emissions Trading Directive,” (Social Science Research Network, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477371; and Kati Kulovesi, Elisa Morgera and Miquel Muñoz “Environmental Integration and the Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package”, *Common Market Law Review* 48 (2011), 829-891.

⁹ Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Belastingadministratie* [1963] ECR 1; see comments by Sands, n. 3 supra, 734. Note that the Court has no longer used that expression, but rather referred to the EU as a *sui generis* legal system: see Markus Puder, “The Rise of Regional Integration Law: Good News for International Environmental Law”, *Georgetown International Environmental Law Review* 23 (2011): 165-210, at 172.

¹⁰ Wouters et al, n. 6 supra, 7-11.

¹¹ Ibid., 9-10. On the special legal protection afforded to EU environmental law, see Jan Jans and Hans Vedder, *European Environmental Law* (Groningen: Europa Law Publishing, 2008) ch. 5.

¹² It has been calculated that around 70-80% of national environmental legislation within the EU Member States is adopted as a consequence of EU environmental law (Kramer, “Regional Economic Integration Organization”, n. 2 supra, 860.)

to the EU and also those aspiring to this,¹³ as well as those interested in a closer political and economic relationship with the EU, have concluded international treaties providing for the approximation of their environmental laws to those of the EU¹⁴ (this is considered the “normative power” of the EU).¹⁵

This chapter will illustrate the development of environmental law of the EU through policy, institutional and legislative developments. In doing so, it will stress the unique characteristics of the EU legal framework and their relevance from an international environmental law perspective. The chapter will in particular highlight the external and internal dimensions of EU environmental law and their interaction. The role of the EU institutions in the development and implementation of EU environmental law will be outlined, and the objectives and principles of the EU environmental policy, focusing specifically on environmental integration and sustainable development, will be discussed. This contribution will conclude by pointing to some of the present challenges facing EU environmental law.

2. The evolution of EU Environmental Law

Traditionally, the evolution of EU environmental law is illustrated by successive phases characterized by the entry into force of the treaties that instituted and regulate the EU (the Treaties).¹⁶ This is because the EU can only act, both externally and internally, within the limits of the powers conferred upon it by the Treaties and towards the objectives assigned to it therein (i.e. principle of conferral or of attributed competences¹⁷). While Treaty developments are certainly key elements in the evolution of EU environmental law, other influential factors should also be taken into account: notably, the influence of concurrent developments in international environmental law and the different economic conditions and environmental law traditions of new Member States.¹⁸ It will also be clarified that often Treaty amendments, rather than introducing radically new elements, endorsed developments that had already appeared and crystallized in the practice of the EU.

First Phase (1958-1972): Birth of the EEC and “incidental”¹⁹ environmental action

The founding Treaty of the European Economic Community (Treaty of Rome) entered into force in 1958: it provided for the creation of a single common market in Europe, with a view to preserving and strengthening peace and stability.²⁰ The common market was based on a customs union, the prohibition of restrictions to the

¹³ Kirstyn Inglis, ‘Enlargement and the Environment *Acquis*,’ *RECIEL* 13 (2004): 135-151.

¹⁴ Marín Durán and Morgera, “Towards Environmental Integration in EC External Relations?,” n. 7 *supra*.

¹⁵ Wouters et al., n. 6 *supra*, 7.

¹⁶ Jans and Vedder, n. 11 *supra*, 3-9; and Sands, n. 3 *supra*, 740-749. The Treaties are currently the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2010] OJ C83/1. The text of the current and previous versions of the Treaties can be found at: <http://eur-lex.europa.eu/en/treaties/index.htm>.

¹⁷ Article 5 TEU.

¹⁸ For a discussion of other factors, such as environmental and economic conditions as well as interests and ideological orientations of key European actors, see Ingmar von Homeyer, “The Evolution of EU Environmental Governance”, in *Environmental Protection, European Law and Governance*, ed. Joanne Scott (Oxford: Oxford University Press, 2009), 1-26.

¹⁹ Jans and Vedder, n. 11 *supra*, 3.

²⁰ Josephine Steiner and Lorna Woods, *EU Law* (Oxford: OUP, 2009) 1.

free movement of goods, workers, services and capital among the Member States, a competition policy and a common commercial policy, as well as common policies on agriculture and transport.²¹ The same parties to the Treaty of Rome (France, Germany, Italy, Belgium, the Netherlands and Luxembourg) had also signed a 50-year Treaty establishing the European Steel and Coal Community in 1952 and a Treaty establishing the European Atomic Community in 1958. As a result, these European Communities created a “single, unrestricted Western European market in potential pollutants – steel, iron, coal and nuclear materials, as well as other goods.”²²

The Treaty of Rome did not contain any reference to the environment, which in retrospect can be considered “hardly surprising” considering that environmental issues were “virtually invisible” as a policy concern in the 1950s.²³ Nonetheless, certain “incidentally environmental” action was taken by the EEC:²⁴ that is, legislative developments with relevance for environmental protection occurred with a view to attaining the common market, such as the adoption of Directive 67/548 on classification, packaging and labelling of dangerous preparations and Directive 70/157 on permissible sound level and exhaust systems of motor vehicles.²⁵

Second Phase (1972-1987): Emergence of the EEC Environmental Policy

With the convening of the first global summit on environmental protection, the 1972 Stockholm Conference on the Human Environment, the EEC together with the international community identified environmental protection as an issue requiring urgent action.²⁶ The same year, a Summit of heads of State of the EEC Member States declared that economic expansion was not an end in itself, but rather the priority was to help attenuate disparities in living conditions, such as improved quality and standard of life: this led to the consideration of “non-material” values such as environmental protection crucial for the EEC economic objectives to be achieved. The Summit consequently requested the drawing up of an action programme for an EEC environmental policy.²⁷

The following year the First Programme of Action of the European Communities on the Environment (1973-1976) was adopted:²⁸ it was a policy declaration setting broad-ranging environmental objectives for the EEC, notably including the search of common solutions to environmental problems with States outside the EEC and international organizations.²⁹ In effect, the EEC environmental policy and the environmental legislation that was enacted during this second phase following the Programme of Action were not backed by a Treaty-based explicit competence for the

²¹ Damian Chalmers et al., *European Union Law* (Cambridge, CUP, 2010) 12.

²² Jane Holder and Maria Lee, *Environmental Protection, Law and Policy* (Cambridge: CUP, 2007) 156.

²³ Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making* (Oxford: Hart, 2005) 1.

²⁴ See Jans and Vedder, n. 11 supra, 3.

²⁵ Respectively [1967] OJ L196/1 and [1971] OJ L42/16.

²⁶ von Homeyer, n. 18 supra, 2; Sands, n. 3 supra, 741; Donald McGillivray and Jane Holder, “Locating EC Environmental Law”, *Yearbook of European Environmental Law* 2 (2001): 139-171, at 144 argue that this influence explains the anthropocentric approach of EU Environmental law.

²⁷ Bulletin EC 1972, No. 10.

²⁸ Declaration of the Council of the European Communities and of the representatives of the Governments of the member States meeting in the Council of 22 November 1973 on the programme of action for the European Communities on the environment [1973] OJ C112/1.

²⁹ [1973] OJ C112/1.

EEC, but rather on the basis of an extensive interpretation of the provisions of the Rome Treaty.³⁰

Thus, for the adoption of EEC environmental legislation recourse was made to a Treaty provision allowing the EEC to take legislative action to approximate national laws that directly affect the establishment or functioning of the common market:³¹ basically, this was used in cases in which differences in national environmental legislation were considered to have (or were likely to have) a detrimental effect on intra-Community trade and competition.³² While this practice permitted the adoption of EEC legislation on aquatic pollution, air pollution, industrial hazards and toxic waste, it only allowed environmental law development to the extent permitted by economic considerations. Thus, another legal basis was invoked, namely a Treaty Article empowering the EEC to take the action necessary to attain in the course of the operation of the common market one of the objectives of the Community where the Treaty itself has not provided necessary powers (so-called “flexibility clause”).³³ In addition, a judicially-made doctrine of implied treaty-making powers³⁴ allowed for broader leeway in environmental law-making by the EEC,³⁵ as well as enabling the EEC to become a party to multilateral and regional environmental agreements.³⁶

Furthermore, the Court of Justice in 1985, addressing the question of the validity of certain environmental protection measures (namely Directive 75/439 on the Disposal of Waste Oils³⁷) conflicting with the free movement of goods, affirmed that the directive had to be interpreted in the perspective of environmental protection, which it declared for the first time to be one of the Community's “essential objectives.” The Court went on to affirm that environmental protection measures, being of general interest, could justify certain restrictions to the free movement of goods as long as they were non-discriminatory and did not go beyond the inevitable restrictions justified by the pursuit of the objective of environmental protection.³⁸ This decision thus sanctioned the possibility of an autonomous environmental policy of the EEC independent of the establishment of the common market.³⁹

During this phase, environmental policy by the EEC has been characterised by a focus on acute health and environmental threats, technocratic and expertise-based decision-making resulting in top-down legally binding rules embodying by environmental quality objectives (“environmental governance”).⁴⁰

³⁰ Jans and Vedder, n. 11 supra, 4; Holder and Lee, n. 22 supra, 157-8.

³¹ Article 100 EEC, later 94 EC (now 115 TFEU); see also Case 92-79 *Commission v. Italy* [1980] ECR 1115.

³² Jans and Vedder, n. 11 supra, 4.

³³ Article 235 EEC, later 308 EC (now 352 TFEU).

³⁴ Case C-22/70 *Commission v. Council* (AETR) [1971] ECR 263; and *Opinion 1/76 on the Draft Agreement establishing a Laying-up Fund for Inland Waterway Vessels* [1977] ECR 471: for a more detailed explanation, see Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, forthcoming 2012) Ch 1.

³⁵ Jans and Vedder, n. 11 supra, 5.

³⁶ Sands, n. 3 supra, 742; Jans and Vedder, n. 11 supra, 58-60.

³⁷ [1975] OJ L194/31.

³⁸ Case 240/83 *Procureur de la République v. Association de Défense des Brûleurs d'huiles usagées* [1983] ECR 531 (“ADBHU case”).

³⁹ Lee, *EU Environmental Law*, n. 23 supra, 16.

⁴⁰ Von Homeyer, n. 18 supra, 9-10.

Third Phase (1987-1993): An explicit legal basis for the EEC environmental policy

The entry into force of the Single European Act (SEA) in 1987, the first treaty amending the Treaty of Rome, marks the beginning of the third phase of the evolution of the EU environmental policy. The SEA aimed to eliminate remaining barriers to the creation of the single internal market and introduced procedural changes to accelerate decision-making by the EEC.⁴¹ It also extended the sphere of competence of the EEC, introducing for the first time, among others, an explicit legal basis for environmental legislation in the Treaty of Rome by setting the objectives, principles and criteria of the EEC environmental policy.⁴² Accordingly, the objectives of EEC action in the field of the environment were: preserving and improving the quality of the environment, contributing towards the protection of human health, and ensuring a prudent and rational utilization of natural resources. This was, therefore, a confirmation of the practice of environmental law-making that had developed in the second phase. The powers of the EEC for the protection of the environment were subject to unanimous decision-making by the Council in consultation with the Parliament.

With the joining of the EEC by Spain and Portugal in 1986, Germany and Denmark – countries with traditionally higher environmental standards – insisted on introducing in the Treaty a provision allowing Member States to maintain or introduce more stringent environmental protection measures than might be pursued at EEC level,⁴³ thereby creating the possibility for a “two-speed environmental Europe.”⁴⁴

During this phase, environmental policy by the EEC has been characterised by “internal market governance”: environmental law harmonization was dominated by the desire to complete the common market and competition concerns, through recourse to process standards to ensure level playing field and remove trade barriers. Top-down legally binding norms, therefore, aimed at imposing the administrative and financial burden on private actors, based on technical feasibility and economic considerations rather than scientific ones.⁴⁵

Fourth Phase (1993-1997): Birth of the EU and raising of environmental protection

Following the convening of another major global summit, the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, another phase in the evolution of EU environmental law began. The Treaty of Maastricht, which entered into force in 1993, significantly amended the EEC Treaty, by renaming the EEC the European Community (EC) to reflect a wider purpose than just economic integration, moving into further integration in social and political areas, and providing a separate Treaty for a new entity – the European Union (EU) – representing political cooperation in the areas of foreign and security policy, and justice and home affairs (so-called second and third pillars). While the distinction between EC and EU became increasingly difficult to draw in practice, the EU was created as an overarching entity that was distinct, but did not formally have a separate legal personality, from the EC. The EU was built upon three pillars: the first pillar embodied by the European Community and its supra-national decision-making modalities, while the second and third pillars represented cooperation among the Member States in the EU based on

⁴¹ Steiner and Woods, n. 20 supra, 6.

⁴² Post-SEA art. 130r EEC.

⁴³ See Marie Soveroski, “EC Enlargement and the Development of European Environmental Policy: Parallel Histories, Divergent Paths?” *RECIEL* 13 (2004): 127-134.

⁴⁴ Holder and Lee, n. 22 supra, 154.

⁴⁵ Von Homeyer, n. 18 supra, 11-14.

intergovernmental modalities rather than transfer of sovereign powers. The Treaty of Maastricht also introduced provisions for the creation of a full economic and monetary union.⁴⁶

From an environmental perspective, the Maastricht Treaty for the first time introduced the environment among the overarching provisions of the EC Treaty, by including among the objectives of the EC the “promotion through the Community of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment.”⁴⁷ While the Treaty did not use the expression “sustainable development”, which had been mainstreamed by the Rio Summit, the weaker expressions related to balanced development and sustainable growth were still considered of great political importance.⁴⁸ The Treaty also significantly amended the legal basis on environmental policy, by adding reference to the precautionary principle and the objective of promoting international measures to deal with regional or worldwide environmental problems.⁴⁹ In addition, the Treaty of Maastricht established that the general rule for decision-making on environmental policy was qualified majority with certain matters remaining subject to unanimity (which have remained unaltered since and are discussed below). Furthermore, the Treaty recognized the legal significance of the Environmental Action Programmes (EAP), which had been adopted regularly since the first one in the early 1970s: it provided that EAPs be adopted through co-decision by the Council and the European Parliament.⁵⁰

It should be noted that Sweden, Finland and Austria – States with higher levels of environmental protection than the existing State Members – joined the EU in 1995. Initially it was hoped that a four-year review period would have allowed the revision of EU standards upwards to bring them in line with those of the new Member States: while certain pieces of EU environmental law were amended as a result of this, however, overall the “average” EU environmental standards were not raised significantly.⁵¹

During this phase, environmental policy by the EC has been characterized by “integration” governance, that is, a focus on efficiency and effectiveness of EU environmental measures and increased attention to implementation rather than legislative production. This resulted in a certain degree of flexibility and decentralization, to better allow accommodation of variations in national and regional conditions across the EU, such as ecological and economic conditions and administrative capacities and traditions. It was reflected in increasingly participatory decision-making through consultations with stakeholders and experts, and in the enactment of pragmatic, horizontal and procedural pieces of legislation that set broad objectives (framework directives) to be better defined through successive pieces of EU legislation (daughter directives) or planning at the national level on the basis of provision of information to, and involvement of, the public.⁵²

⁴⁶ Steiner and Woods, n. 20 supra, 7.

⁴⁷ Post-Maastricht arts. 2 and 3(k) EC. See Jans and Vedder, n. 11 supra, 6-7.

⁴⁸ Jans and Vedder, n. 11 supra, 7.

⁴⁹ Post-Maastricht Art. 130r(1) EC. See Sands, n. 3 supra, 746.

⁵⁰ Post-Maastricht Art. 130s(3) EC. Jans and Vedder, n. 11 supra, 7.

⁵¹ Inglis, n. 13 supra, 148-149.

⁵² Von Homeyer, n. 18 supra, 14-18.

Fifth Phase (1997-2008): Sustainable development in the EU

With the entry into force of the Treaty of Amsterdam in 1997, the EU is believed to have shifted away from a mainly economic organization to a more political one founded on fundamental rights and principles of liberty, democracy and the rule of law.⁵³ The Treaty brought about a streamlining of decision-making, mainly focused on the creation of an Area of Freedom, Security and Justice based on the absence of internal border controls for persons, a common policy on asylum, immigration and external border control, a high level of security and facilitated access to justice within the EU.⁵⁴

From an environmental perspective, the Treaty of Amsterdam fine-tuned the inclusion of environmental protection and sustainable development in the general clauses of the EC Treaty. It reformulated reference to sustainable development among the objectives of the EC as the “harmonious, balanced and sustainable development of economic activities” and included there explicit reference to a “high level of protection and improvement of the quality of the environment.”⁵⁵ It also upgraded a requirement for environmental mainstreaming in other policy areas of the EU (“environmental integration”) to a general principle of EU law, rather than a provision confined within the environmental chapter.⁵⁶ Finally, the Treaty of Amsterdam established that co-decision was the normal decision-making procedure for environmental policy, thus ensuring a veto power for the European Parliament.⁵⁷ This procedure has remained relevant for environmental policy at present, although it has been renamed “ordinary legislative procedure” by the Treaty of Lisbon⁵⁸ (see next phase).

During this phase, the Sixth Environmental Action Programme (2002-2012) that is currently in place was elaborated: it was clearly influenced by the international negotiations leading to the 2002 World Summit on Sustainable Development held in Johannesburg to follow up on the Rio Summit commitments. The sixth EAP has a marked international dimension, by prioritizing global issues such as climate change, biodiversity, chemicals and waste, and by emphasizing international action for the swift ratification, effective compliance and enforcement of all international conventions and agreements relating to the environment where the EU is a party. The sixth EAP also points to the need to integrate environmental protection in all EU external policies, strengthening international environmental governance, promoting sustainable environmental practices in foreign investment, achieving mutual supportiveness between trade and environmental needs, and promoting a world trade system that fully recognizes multilateral environmental agreements, including regional ones, and the precautionary principle.⁵⁹

In addition, during this phase the so-called “big-bang” enlargement of 2004 took place: ten new countries joined the EU from the East and the South: on that occasion, environmental policy formally became an area to be specifically addressed in pre-accession negotiations, given the need for “upward pressure” to align the

⁵³ Steiner and Woods, n. 20 supra, 11.

⁵⁴ Chalmers et al, n. 21 supra, 28.

⁵⁵ Post-Amsterdam art. 2 EC.

⁵⁶ Post-Amsterdam art. 6 EC.

⁵⁷ Post-Amsterdam art. 175 EC. See Jans and Vedder, n. 11 supra, 8-9.

⁵⁸ Art. 294 TFEU.

⁵⁹ Sands, n. 3 supra, 753.

environmental protection policy of new Member States with that of the EU.⁶⁰ By 2007, the EU reached its current membership of 27 States: the increased diversity across the Member States has led to more general environmental law-making by the EU.⁶¹ Indeed, environmental policy by the EU has been characterized by “sustainable development” governance: that is, a focus on long-term environmental problems, more strategic action and softer legal measures. Thus, EU environmental legislation leaves the setting of concrete targets to the implementation phase, which is supported by the development of non-legally binding guidance to national and lower-level authorities. This is coupled with incentives for learning through information exchange among different Member States’ national authorities and stakeholders, and regular revisions.⁶²

The present: The international relevance of the EU Environmental Law

The most recent Treaty development is the entry into force of the Lisbon Treaty in December 2009: this amended the Treaty of the European Union (TEU), which now includes more general provisions on the mission and values of the EU, its democratic principles, the composition and functions of its institutions and detailed provisions on the EU’s external action. The Treaty of Lisbon also significantly amended the EC Treaty, which is renamed the Treaty on the Functioning of the European Union (TFEU), owing to the fact that the EC has been merged with the EU, with the latter having been given international legal personality.⁶³ The TEU and TFEU are of equal value.⁶⁴

From an environmental perspective,⁶⁵ the Treaty of Lisbon confirmed that the EU shares its competence on environmental protection with the Member States, while it retains exclusive competence with regards to the conservation of marine living resources in the context of the Common Fisheries Policy.⁶⁶ With regards to the environmental legal basis, the Treaty of Lisbon singles out climate change as one of the global environmental issues for which the EU is expected to play a significant role at international level:⁶⁷ this actually reflects the political priority attached to this specific environmental problem by the EU since the early 2000s.⁶⁸ In this connection, while it is too early to characterize this period in any way in terms of governance, it has been anticipated that increased attention to climate change may, on the one hand, lead to a return to more centralized decision-making, owing also to the involvement of

⁶⁰ Soveroski, n. 43 supra, 129.

⁶¹ Kramer, “Regional Economic Integration Organization”, n. 2 supra, 859.

⁶² Von Homeyer, n. 18 supra, 18-24.

⁶³ Art. 47 TEU. Chalmers et al, n. 21 supra, 38-50.

⁶⁴ Arts. 1(2) TFEU and 1(3) TEU.

⁶⁵ Maria Lee, “The Environmental Implications of the Lisbon Treaty”, *Environmental Law Review* 10 (2008): 131-138; and Hans Vedder, “The Treaty of Lisbon and European Environmental Policy” (Social Science Research Network, 2008), http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1310190_code894969.pdf?abstractid=1310190&mirid=1.

⁶⁶ Arts. 4(2)(e) and 3(1)(d) TFEU respectively.

⁶⁷ Art. 191(1) TFEU.

⁶⁸ The EU elevated climate change as a priority also in its overall agenda on sustainable development and international cooperation, building upon the UN-driven inclusion of climate change among key threats to global security. Morgera and Marín Durán, “The UN 2005 World Summit...”, n. 4 supra.

“high-politics” EU institutions, and on the other hand, an increased potential for integration of the environmental policy into the EU energy and security policies.⁶⁹

As a result of the Treaty of Lisbon, environmental integration is no longer the only mainstreaming requirement included among the general principles of EU law. While it can be argued that this may have decreased its visibility,⁷⁰ two new provisions further support environmental integration: one requires integrating animal welfare requirements in certain policy areas,⁷¹ and the other has regard to the need to preserve and improve the environment in the context of the EU energy policy, which is to aim, *inter alia*, at promoting energy efficiency and energy saving and the development of new and renewable forms of energy.⁷²

It should also be noted that the Treaty of Lisbon established that the EU Charter of Fundamental Rights (which had been unanimously approved by the European Council in December 2000, albeit with uncertain legal status) has the same legal value of the Treaties.⁷³ In that regard, it should be underlined that the Charter includes an environmental provision that, significantly, is not framed in rights-based language, but rather provides a policy statement on environmental integration (similar in wording to Article 11 TFEU discussed below).⁷⁴ This clearly provides an indication of how controversial an explicit right to environmental quality remains in the EU, while it remains unclear whether the environmental provision of the Charter has any added value vis-à-vis the pre-existing Treaty-based requirement of environmental integration.

Possibly the most significant environmental feature of the Treaty of Lisbon, particularly for present purposes, is the emphasis placed on the external dimension of the EU environmental policy. The Treaty introduces an express link between sustainable development and EU external relations, by clarifying that “in its relations with the wider world, the Union shall [...] contribute to [...] the sustainable development of the Earth.”⁷⁵ Furthermore, the Lisbon Treaty underscores the explicit link between environmental protection and external action, clarifying that the EU environmental objectives should guide both the general external relations of the EU, as well as specifically common foreign and security policy.⁷⁶ A new explicit legal basis on the EU external action indeed provides that the EU shall define and pursue common policies and actions, and work for a high degree of cooperation in all fields of international relations, with the specific objective of fostering the sustainable economic, social and environmental development of developing countries, to eradicate poverty; and help to develop international measures to preserve and improve

⁶⁹ Von Homeyer, n. 18 supra, 26.

⁷⁰ Lee, “The Environmental Implications of the Lisbon Treaty”, n. 65 supra, 134; Vedder, “The Treaty of Lisbon and European Environmental Policy”, n. 65 supra, 3.

⁷¹ Namely, in the areas of agriculture, fisheries, transport, internal market, research and technological development and space policies (Art. 14 TFEU).

⁷² Art. 194(1) TFEU.

⁷³ Art. 6(1) TEU.

⁷⁴ Charter, art. 37 reads: “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”; while Article 11 TFEU reads: “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”

⁷⁵ Art. 3(5) TEU.

⁷⁶ Vedder, “The Treaty of Lisbon and European Environmental Policy”, n. 65 supra, 3.

the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.⁷⁷

In over 35 years of environmental policy, over 200 secondary legislative instruments have been adopted by the EU covering sectoral issues such as water, air pollution (including ozone layer protection and the fight against climate change), noise, dangerous substances, genetically modified organisms, waste, nuclear safety, and the conservation of nature; as well as horizontal measures such as environmental impact assessment, integrated pollution prevention and control, environmental governance, integrated product policy, and environmental liability.⁷⁸ This contribution, however, will confine itself to outlining the content and significance of the environmental provisions of the Treaties (the primary law of the EU) in the next section.

Summary table of the evolution of EU Environmental Law⁷⁹

Treaty changes	Evolution of EU Environmental Law	Enlargements	International environmental law developments
First Phase (1958-1972) <ul style="list-style-type: none"> · European Coal and Steel Community (1952-2002) · Treaty of Rome (1958): birth of the EEC (common market) · EURATOM Treaty (1958) 	<ul style="list-style-type: none"> · Lack of reference to the environment in the Treaty of Rome · Incidental environmental action 	Founding members: Belgium, Germany, France, Italy, Luxembourg and the Netherlands	

⁷⁷ Art. 21(2)(d) and (f) TEU.

⁷⁸ For a succinct account of substantive EU environmental law, see Jans and Vedder, n. 11 supra, ch. 8.

⁷⁹ Based on sources cited in section 2 of this paper. For each legal instrument, the year of entry into force (for the EU, in the case of MEAs) is indicated.

<p>Second Phase (1972-1986)</p>	<ul style="list-style-type: none"> • First Environmental Action Programme (1973-1976) • Case 240/83 ADBHU: environmental protection as an “essential objective” • “Environment” governance (quality objectives) 	<p>1973 UK, Ireland & Denmark</p> <p>1981 Greece</p> <p>1986 Spain & Portugal</p>	<ul style="list-style-type: none"> • 1972 Stockholm Conference on Human Environment • EC becomes party to: Barcelona Convention for the protection of the Mediterranean Sea against Pollution (1978); Berne Convention on the Conservation of European Wildlife and Natural Habitats and Convention on the Conservation of the marine fauna and flora of the Antarctic (1982); Convention on the Conservation of Migratory Species and UNECE Convention on Long-range Transboundary Air Pollution (1983)
<p>Third Phase (1987-1992)</p> <p>Single European Act (1987)</p> <ul style="list-style-type: none"> • Elimination of remaining barriers to single market 	<ul style="list-style-type: none"> • explicit legal basis for environmental policy • unanimous decision-making • “internal market” governance (emission limits) 		<p>EC becomes party to Convention for the Protection of the Ozone Layer and its Montreal Protocol (1989)</p>

<p>Fourth Phase (1993-1997)</p> <p>Treaty of Maastricht (1993)</p> <p>EC & EU</p> <ul style="list-style-type: none"> • economic and monetary union • cooperation in foreign and security policy 	<ul style="list-style-type: none"> • introduced “environment” into overarching Treaty provisions • precautionary principle and objective of promoting measures to deal with regional and worldwide environmental problems • reference to “sustainable growth” • qualified majority voting (with exceptions) • “Integration” governance 	<p>1995 Austria, Finland & Sweden</p>	<ul style="list-style-type: none"> • 1992 Rio Conference on the Environment and Development • EC becomes a party to: UNFCCC, CBD and Basel Convention (1994); UNECE Water Convention and the Alpine Convention (1996); and Espoo Convention (1997)
<p>Fifth Phase (1997-2009)</p> <p>Treaty of Amsterdam (1997)</p> <ul style="list-style-type: none"> • Fundamental rights and principles of democracy, liberty and rule of law • Area of Freedom, Security and Justice 	<ul style="list-style-type: none"> • Sustainable development and high level of environmental protection among the overarching provisions of EC law • Environmental integration as general principles of EU law (Art. 11 TFEU) • Co-decision (ordinary legislative procedure) • Sixth EAP (2002-2012) • “Sustainable development” governance (‘reflexive’ framework directives, EU-wide targets and strategies) 	<p>2004: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia</p> <p>Env’tl policy becomes formally an area to be specifically addressed in pre-accession negotiations</p> <p>2007: Romania & Bulgaria</p>	<ul style="list-style-type: none"> • 2002 World Summit on Sustainable Development • EC becomes a party to: UNCLOS, UNCCD and Convention for the Protection of the Marine Environment of the North-East Atlantic (1998); Convention on the Protection of the Marine Environment of the Baltic Sea Area and UNECE Convention on Transboundary Effects of Industrial Accidents (2000); Kyoto Protocol and Cartagena Protocol (2003); Stockholm and Rotterdam Conventions (2004); Aarhus Convention (2005)

<p>Treaty of Lisbon (Dec. 2009)</p> <ul style="list-style-type: none"> • EU with legal personality (merged with EC) • Institutional amendments • EU Charter with the same legal value than Treaties (art. 6 TEU) • General integration/coherence clause (art. 7 TFEU) 	<ul style="list-style-type: none"> • Explicit reference to climate change (Art. 191(1) TFEU) • new legal basis on energy policy (Art. 194 TFEU) • Environmental component of new unified legal basis for external action (Arts. 3(5) TEU & 21(2) TEU) • Climate change governance (centralization)? 	<p>[Candidate countries: Croatia, Turkey, Iceland and Macedonia</p> <p>Potential candidate countries: Montenegro, Albania, Bosnia and Herzegovina, Serbia and Kosovo]</p>	<p>2012: Rio+20 UN Summit</p>
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3. Sources and Actors

Before turning to the substance of the Treaty provisions related to the EU environmental policy, it will be necessary to briefly introduce the sources of EU law and the main actors involved in EU environmental law development and implementation.

Besides the Treaties (EU primary law), the sources of EU law include the international treaties to which the EU is a party, EU legislation adopted in the application of the Treaties (secondary EU law), and the decisions of the EU judiciary. Secondary EU law comprises regulations, directives and decisions.⁸⁰ As opposed to instruments of international law, secondary EU Law does not require ratification by Member States.⁸¹ Regulations are centralized, legally-binding instruments that have general and direct application: from the date of entry into force, they automatically form part of the domestic legal order of each Member State without need for national transposition. Directives are the most common legal instrument for EU environmental policy: they are binding as to the result to be achieved, but need transposition into domestic legal orders before having effect,⁸² thus allowing flexibility to national authorities in the choice of form and method of reaching their objective. Decisions normally have a specific addressee, generally a Member State but possibly also private individuals or entities.

International agreements to which the EU is a party bind both the EU Member States and the EU institutions.⁸³ It should also be stressed that the EU has an obligation to contribute to the “strict observance and the development of international law, including respect for the principles of the United Nations Charter.”⁸⁴ Usually, international agreements are concluded both by the EU and its Member States: this phenomenon is called “mixed agreements” and applies to the vast majority of Multilateral Environmental Agreements. In these instances, the EU and its Member States work in close association in the negotiation, conclusion and implementation of these agreements. The extent to which the EU and Member States are bound vis-à-vis other contracting parties of these international agreements is in principle to be determined by the EU and the Member States based on respective responsibilities: in practice, a declaration on this is issued but it remains difficult to infer from it the precise allocation of competence and international responsibility between the EU and its Member States.⁸⁵

The EU institutions⁸⁶ that are most involved in EU environmental policy and law are: the European Commission, the Council of Ministers (“the Council”) and the European Parliament, which are all involved in the law-making process; the Court of Justice;

⁸⁰ Art. 288 TFEU; see also Chalmers et al., n. 21 supra, 98-103 and Steiner and Woods, n. 20 supra, 70-76.

⁸¹ Kramer, “Regional Economic Integration Organization”, n. 2 supra, 856.

⁸² The Court of Justice has established that directives may have direct effect under certain conditions, albeit the case law on this point is particularly complex: see generally Chalmers et al., n. 19 supra, 285-293; and specifically on the direct effect of environmental directives, Jans and Vedder, n. 11 supra, 173-196.

⁸³ Art. 216(2) TFEU; see also Chalmers et al., n. 21 supra, ch. 15.

⁸⁴ Art. 3(5) TFEU.

⁸⁵ Jans and Vedder, n. 11 supra, 60-66.

⁸⁶ Art. 218 TFEU. For an environmental perspective, see Ludwig Kramer, *EC Environmental Law* (London: Sweet & Maxwell, 2006), ch 2; and Albert Weale et al, *Environmental Governance in Europe* (Oxford: OUP, 2000), ch. 3.

certain European Agencies; and, increasingly, the European Council for high-politics environmental issues such as climate change.⁸⁷ The tasks and powers of each will be briefly described with a view to highlighting their international relevance.

The Commission can be considered the EU “civil service” and represents the interests of the EU. The term actually covers two institutional levels: a political one comprising the College of the Commissioners, who are periodically appointed based on nominations from individual Member States; and a bureaucratic level, comprising permanent staff carrying out technical work. The Commission has monopoly in proposing environmental legislation, although it can be prompted to do so by the Council, the European Parliament,⁸⁸ and more than a million EU citizens from a significant number of Member States.⁸⁹ The Commission also serves as an executive arm of the EU, by collecting national reports and legislation, elaborating implementing measures, and administering funds. The Commission is furthermore the “watchdog” of EU law, monitoring compliance with EU environmental law by Member States and initiating judicial action against those in non-compliance, within wide margins of discretion. The EU judiciary clarified, in a case concerning France’s non-compliance with a regional environmental treaty, that the Commission must monitor also the implementation by Member States of the provisions of international treaties concluded by the EU, and that Member States are in breach of their obligations under EU law when they do not comply with such provisions, even where no transposition into EU law has yet taken place.⁹⁰ On the international scene, the Commission may also act as the international negotiator of the EU, usually on the basis of instructions provided by the Council. When mixed agreements are concerned, the Commission and Member States may constitute a mixed delegation.⁹¹ Finally, the Commission can be seen as the “public face” and “think-tank” of the EU.⁹²

The Council of Ministers (the Council) represents the interests of the Member States, and gathers Ministers from each Member State depending on its sectoral formation: thus, the Environment Council gathers environmental ministers from all the Member States. The Council exercises legislative and budgetary functions jointly with the Parliament, as well as policy-making and coordination functions. Its default voting system is qualified majority.⁹³ It has responsibility to determine the opening of negotiations of an international agreement, and to authorize its signature and

⁸⁷ Arts. 13-19 TEU; see also Steiner and Woods, n. 18 supra, 25-50; Chalmers et al., n. 19 supra, ch. 2.

⁸⁸ Article 225 TFEU (ex Article 192, second subparagraph, TEC) reads: “The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.”

⁸⁹ This is the so-called “citizens’ initiative” introduced by the Treaty of Lisbon: art. 11(4) TEU.

⁹⁰ Case C-239/03 *Commission v France* [2004] ECR I-9325; see Kramer, “Regional Economic Integration Organization”, n. 2 supra, 869.

⁹¹ T Delreux, *The EU as an International Environmental Negotiator* (Surrey, Ashgate, 2011). The role of the Commission and of Member States as international negotiators for the EU in multilateral environmental processes has been the subject of political debate following the entry into force of the Lisbon Treaty: compare contributions by Buck and Thomson in Elisa Morgera (ed), *The External Environmental Policy of the EU: EU and International Law Perspectives* (CUP, forth. 2012) chs. 4-5.

⁹² Puder, n. 9 supra, at 177.

⁹³ As from 1 November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union (art. 16(4) TEU).

conclusion. It also determines the mandate of the Commission as a negotiator in international fora.

The European Parliament is elected by direct universal suffrage to represent the interests of the EU citizens. It exercises democratic control over the EU institutions, in particular the Commission. It shares legislative powers with the Council (co-decision is the legislative mechanism for environmental law-making) and budget decision-making power. As to international action, the European Parliament has the right to provide its consent before the Council's decision to conclude an international agreement covering fields to which the ordinary legislative procedure applies, as is the case of environmental protection.

The European Council gathers the heads of State and government of the Member States, its own president, the president of the Commission and the High Representative of the Union for Foreign Affairs.⁹⁴ It provides the necessary impetus for the development of the Union, as well as defining general political directions and priorities. It is therefore a high-level policy-making body that acts as a "pacemaker and command-bridge."⁹⁵ It generally decides by consensus, although it adopts legally binding acts (mostly related to the Union institutions and appointments) according to different types of majority voting determined by the Treaties.⁹⁶

The EU judiciary⁹⁷ ensures respect for and consistent interpretation of EU law. It can impose pecuniary sanctions on Member States for non-compliance with its judgments: significantly, the first cases in which the Court availed itself of this power were cases of continued violation of EU environmental law.⁹⁸ The EU judiciary has also played a significant role in EU external relations by determining the existence, scope and nature of EU competences in international law; confirming that international agreements are binding and form integral part of the EU legal order; and ensuring that EU respects international law in the exercise of its powers (including customary international law).⁹⁹

The EU has created a plethora of executive, regulatory and scientific-technical agencies. The first was the European Environmental Agency (EEA), created in 1990,¹⁰⁰ to provide EU institutions and Member States with information on environmental protection in the EU, monitor and assess results of environmental protection measures, and ensure public information. It cooperates with the Commission to ensure full application of EU legislation, and participates in international environmental monitoring. The EEA has been considered a model for international environmental monitoring arrangements in other regions and globally.¹⁰¹ Other environment-relevant EU agencies include the European Maritime Safety Agency, which collects and analyses environmental data and assists the Commission

⁹⁴ This is a new institutional figure introduced by the Treaty of Lisbon to ensure the coordination of the EU external action and represent the EU internationally: art. 18 TEU.

⁹⁵ Puder, n. 9 *supra*, 177.

⁹⁶ For a summary of the decision-making powers of the European Council, see Appendix 6 in Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge: CUP, 2010).

⁹⁷ Composed of the Court of Justice, the General Court and specialized courts.

⁹⁸ *Case C-387/97 Commission v. Greece* [2000] ECR I-5047; *Case C-278/01 Commission v. Spain* [2003] ECR I-14141; and *Case C-304/02 Commission v France* [2005] ECR I-6263.

⁹⁹ Paul Craig and Gráinne de Búrca, *EU Law, Text, cases and materials* (Oxford: OUP, 2008), 213-225.

¹⁰⁰ Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network [2009] OJ L 126/13.

¹⁰¹ Sands, n. 3 *supra*, 740.

and the Member States in activities to improve identification and pursuit of ships making unlawful discharges;¹⁰² the European Fisheries Control Agency, which assists in operational coordination of Member States' measures to combat illegal, unregulated and unreported fishing and in the relationships with Regional Fisheries Management Organizations;¹⁰³ and the European Chemicals Agency, which manages the registration, evaluation, authorisation and restriction processes for chemical substances to ensure consistency across the European Union.¹⁰⁴ Finally, it should be emphasized that Member States remain fundamental actors in EU environmental law: they are to finance and implement EU Environmental law,¹⁰⁵ and provide ideas and lessons learnt based on their individual traditions and experience for the further development of EU environmental law.

4. The objectives and principles of EU Environmental Law

As mentioned above, the Treaty on the Functioning of the EU provides the basis for the EU competence in environmental matters in an explicit way. It does so by setting out the objectives of the EU environmental policies, its principles and other relevant policy considerations.¹⁰⁶

The objectives of the EU environmental policy are: “preserving, protecting and improving the quality of the environment; protecting human health; ensuring the prudent and rational utilization of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.”¹⁰⁷ Given that these objectives are quite broadly defined, it is almost impossible to clearly define the boundaries of EU environmental policy: there is sufficient flexibility for the EU to adapt its environmental policy to new developments and emerging environmental issues, and generally for this provision to be interpreted in a non-restrictive way. In addition, it has been argued that this provision allows the adoption of measures that result directly or indirectly in an improvement of the environment, such as conservation, restoration, repressive, precautionary, preventive and eminently procedural environmental measures.¹⁰⁸

Ultimately, the substantive limits of the EU competence in the area of environmental protection are “determined on the case-by-case by the EU political institutions as they adopt measures in pursuance of the broadly-framed Treaty objectives, whether unilaterally or by concluding international agreements.”¹⁰⁹ The substantive limits of the EU environmental competence (internally and externally) are thus reflected, as

¹⁰² Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency [2006] OJ L394/1.

¹⁰³ Council Regulation (EC) No 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy [2005] L128/1.

¹⁰⁴ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency [2006] L396/1.

¹⁰⁵ Art. 192(4)-(5) TFEU.

¹⁰⁶ The latter include: available scientific and technical data; environmental conditions in the various regions of the EU; potential benefits and costs of action or lack of action; economic and social development of the EU as a whole and the balanced development of its regions. (Art. 191(3) TFEU).

¹⁰⁷ Art. 191(1) TFEU.

¹⁰⁸ Jans and Vedder, n. 11 supra, 26-35.

¹⁰⁹ Marín Durán and Morgera, n. 34 supra.

they evolve, in the EU “*acquis*,” the body of common rights and obligations binding upon all the EU Member State arising from the content, principles, and political objectives of the Treaties; legislation adopted in the application of the Treaties; the case law of the European courts; international agreements concluded by the EU; and soft law instruments adopted by EU institutions. In a nutshell, it is the “growing legal universe” produced by the EU governance system since the launch of its integration process.¹¹⁰

As to the territorial scope of the EU environmental competence, reference to worldwide and regional environmental problems in the Treaty clarifies that the EU can also take unilateral and multilateral measures targeting the environment beyond its borders, in the same way in which its Member States can do so, within the limits imposed by international law on extraterritorial environmental powers.¹¹¹ The Court of Justice clarified, for instance, in the area of the fisheries policy, that the EU has competence over fishing in the high seas in so far as its Member States have similar authority under public international law.¹¹²

While there are no clear substantive limits to the exercise of EU environmental competence, this is still subject to the general principles of proportionality and subsidiarity: under the latter principle, the EU will take action if the objectives of the proposed environmental action cannot be sufficiently achieved by Member States and by reason of the scale or effects of the proposed action, these objectives are better achieved at the EU level.¹¹³ Furthermore, environmental competence is exercised under the decision-making procedures set out by the Treaty. Generally, EU environmental law is subject to the agreement between the Council (acting by qualified-majority voting) and the European Parliament (under the ordinary legislative procedure). In certain specific areas, however, the Treaty requires unanimous decision-making by the Council, namely: provisions primarily of a fiscal nature; measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, and land use with the exception of waste management; and measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply.¹¹⁴ These are areas in which Member States wish to retain a higher degree of control because of their politically sensitive nature or concerns about the preservation of national sovereignty.¹¹⁵

As indicated above, the environmental competence of the EU is shared with the Member States:¹¹⁶ thus Member States can exercise their competence only as long as the EU has not exercised its competence, or has decided to cease to exercise it. In this respect, it should be emphasized that the scope of the EU competence vis-à-vis that of the Member States is difficult to be determined, as EU environmental policy is subject

¹¹⁰ Puder, n. 9 supra, at 179.

¹¹¹ Jans and Vedder, n. 11 supra, 31-36.

¹¹² Joint Cases 3,4 and 6/76 *Kramer* [1967] ECR 1279 and Case C-405/92 *Drift Net* [1993] ECR I-6133.

¹¹³ Art. 5(3) TEU. This principle was initially enshrined in the Treaties with specific regard to environmental policy, and later became a general principle of EU law. See Chalmers et al, n. 19 supra, 363-366.

¹¹⁴ Art. 192 TFEU.

¹¹⁵ Holder and Lee, n. 22 supra, 154; McGillivray and Holder, n. 26 supra, 145.

¹¹⁶ Art. 4(2)(e) TFEU.

to continuous evolution.¹¹⁷ This has important implications on the international scene. As the TFEU states,

“Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.”¹¹⁸

In broad approximation, if the EU adopted environmental measures internally, Member States have no longer competence to undertake international obligations that would affect those EU rules, unless the EU measures allowed – which is often the case – Member States to adopt more stringent measures,¹¹⁹ including in principle the possibility of undertaking more stringent international obligations. This flexibility for Member States, however, is subject to the duty of sincere cooperation enshrined in Article 4(3) TEU,¹²⁰ which the Court has interpreted as entailing enforceable substantive and procedural obligations with a view to protecting the unity in the international representation of the EU.¹²¹

The Treaty also identifies the principles that should guide the EU internal and external environmental policy,¹²² both as guide for law-making and for interpretation. The EU legislator, however, has a significant margin of discretion in implementing the principles: the Court has in fact clarified that only in exceptional cases an EU measure could be annulled for insufficient regard to these principles, in cases of manifest error of appraisal by the EU legislature: this was justified on the need to strike a balance between environmental objectives and principles and of the complexity of the implementation of the environmental policy criteria.¹²³

High level of environmental protection

¹¹⁷ Jans and Vedder, n. 11 supra, 61-64.

¹¹⁸ Art. 191(4) TFEU.

¹¹⁹ Jans and Vedder, n. 11 supra, 62-63. See also art. 193 TFEU, which states that in the case the EU adopts minimum protection requirements, these “shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.”

¹²⁰ Which reads: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

¹²¹ Case C-266/03 *Commission v Luxembourg (re Inland Waterways Agreement)* [2005] ECR I-4805, para 60 and Case C-433/03 *Commission v Germany (re Inland Waterways Agreement)* [2005] ECR I-6985, para 66; Case C-246/07 *Commission v Sweden (re POPs Convention)*, judgement 20 April 2010, para 104. For a discussion, see Marín Durán and Morgera, n. 34 supra.

¹²² Art. 191(2) TFEU.

¹²³ Case C-284/95 *Safety Hi-Tech Srl. V. S. & T. Srl* [1998] ECR I-4301, para. 37; see comments by Jans and Vedder, n. 11 supra, 36.

The principle of “high” level of protection is considered “the most important substantive principle of European environmental policy”¹²⁴ given its inclusion in the general objectives of the EU.¹²⁵ Nonetheless, the principle is not defined by the Treaty and is made subject to consideration of the “diversity of situations in the various regions of the Union.”¹²⁶ While a high level of environmental protection cannot be understood as allowing the EU to adopt the lowest common denominator among the Member States’ environmental protection measures,¹²⁷ the Court of Justice clarified that it does not necessarily have to be the highest that is technically possible.¹²⁸ Overall, it can be concluded that the principle reflects a moving target – the idea of continuous improvement of the environmental protection standards across the Member States.¹²⁹

Precaution

The precautionary principle, also a principle of international environmental law,¹³⁰ has been interpreted by the Commission, in a guidance document aimed at EU institutions, Member States and private actors,¹³¹ as a risk management tools that is essential for the achievement of a high level of environmental protection when facing unknown risks.¹³² To implement the principle, a risk assessment should be as complete as possible given the particular circumstances of the individual case, with a view to establishing precautionary measures that are “proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on an examination of the potential benefits and costs of action or lack of action, and subject to review in the light of new scientific data.”¹³³ The trigger of the precautionary principle is a situation where “preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the *environment, human, animal or plant health* may be inconsistent with the high level of protection chosen for the [EU].”¹³⁴

The Court of Justice has seized various opportunities to apply the precautionary principle, both within and outside the EU environmental policy.¹³⁵ For instance, the

¹²⁴ Jans and Vedder, n. 11 *supra*, 36.

¹²⁵ Art. 3(3) TEU reads: ‘[The Union] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and *a high level of protection and improvement of the quality of the environment*’ (emphasis added). Note that also the EU Charter of Fundamental Rights uses this expression with regard to environmental integration.

¹²⁶ Article 191(2) TFEU reads: ‘Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.’

¹²⁷ Kramer, *EC Environmental Law*, n. 84 *supra*, 12-13.

¹²⁸ Case C-284/95 *Safety Hi-Tech Srl. V. S. & T. Srl* [1998] ECR I-4301; see also Jans and Vedder, n. 11 *supra*, 36-37.

¹²⁹ Kramer, *EC Environmental Law*, n. 84 *supra*, 12.

¹³⁰ Rio Declaration on Environment and Development, UN. Doc. A/CONF.151/26, 1992 (Vol. I) (hereinafter, Rio Declaration), principle 15. See Sands, n. 3 *supra*, 266-278.

¹³¹ Commission, Guidelines on the Precautionary Principle, COM(2000)1.

¹³² Puder, n. 6 *supra*.

¹³³ Commission, Guidelines on the Precautionary Principle, n. 130 *supra*, para. 6. See comments by Jans and Vedder, n. 11 *supra*, 38.

¹³⁴ Commission Guidelines on the Precautionary Principle, n. 130 *supra*, para. 3.

¹³⁵ On the latter point, see arguments about the general nature of the principle in Craig and de Búrca, n. 98 *supra*, 567-568.

Court of Justice held that in the framework of the Habitats Directive,¹³⁶ the requirement of an appropriate assessment of the implications of plans or project that may have significant effects on protected areas is conditional upon the “probability or the risk” that the plan or project will have significant effects on the site concerned, and that this should be interpreted in a precautionary manner. So, an assessment is considered necessary whenever it cannot be excluded that a certain project or plan will have significant effects on the site on the basis of objective information.¹³⁷

Prevention

This principle, once again also an international environmental principle,¹³⁸ calls for taking action to protect the environment at an early stage, with a view to preventing damage from occurring rather than repairing it.¹³⁹ The main difference with the precautionary principle lies in the availability of data on the existence of a risk, although such distinction may be difficult to be drawn in practice. The Court of Justice, for instance, relied on the prevention principle, as well as that of high level of protection, to review an export ban on British beef adopted in the context of the Common Agricultural Policy because of a possible – rather than certain – risk related to the mad-cow disease.¹⁴⁰

Guidance on the application of the principle can be found in the third Environmental Action Programme, which stressed the need to improve information for decision-makers and the public (for instance through monitoring and surveying requirements), introduce procedures supporting prompt and informed decision-making on the environment such as the environmental impact assessment, and monitor implementation of adopted measures to ensure their adaptation in light of new circumstances or knowledge.¹⁴¹ The prevention principle has been particularly influential in the development of EU environmental law, for instance in the case of EU waste legislation, prevention is the top priority in waste management and is operationalized through “measures taken before a substance, material or product has become waste, that reduce: (a) the quantity of waste, including through the re-use of products or the extension of the life span of products; (b) the adverse impacts of the generated waste on the environment and human health; or (c) the content of harmful substances in materials and products.”¹⁴²

Source principle

The principle entails that environmental damage should be as a priority rectified at its source,¹⁴³ and has had particular resonance in the area of waste management. The

¹³⁶ Council Directive (EC) 92/43 on the Conservation of Natural Habitats and of wild fauna and flora [1992] OJ L206/7.

¹³⁷ Case C-6/04 *Commission v UK* [2005] ECR I-9017, para. 54; see Jans and Vedder, n. 11 *supra*, 40.

¹³⁸ Sands, n. 3 *supra*, 246-248.

¹³⁹ Jans and Vedder, n. 11 *supra*, 40-42.

¹⁴⁰ Case C-157/96 *National Farmers Union* [1998] ECR I-2211, para. 64, although it has been convincingly argued that the precautionary principle rather than the prevention principle was relevant in this case given that the risk was a possibility rather than a certainty: see Nele Dhondt, *Integration of Environmental Protection into Other EC Policies; Legal Theory and Practice* (Groningen: Europa Law Publishing, 2003), 151.

¹⁴¹ Dhondt, n. 139 *supra*, 151.

¹⁴² Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste [2008] OJ L 312/3, Arts. 4 and 3(12).

¹⁴³ Jans and Vedder, n. 11 *supra*, 42-43.

Court of Justice held that according to this principle local authorities must take measures necessary to ensure the reception, processing and removal of its own waste so that it can be disposed of as close as possible to its place of production. This interpretation allowed the Court to consider justified measures that discriminated against waste produced in different areas.¹⁴⁴ In another case, the Court specified that the principle could not serve to justify any restriction on waste exports, but only when the waste in question was harmful to the environment.¹⁴⁵

Polluter pays

The principle, also an international environmental principle,¹⁴⁶ posits that the costs of the measure to deal with pollution should be borne by those causing the pollution, through the imposition of environmental charges, environmental standards or environmental liability. In addition, the principle has been interpreted in the EU context so that environmental protection should not in principle depend on the granting of state aid or policies placing the burden on society, and that requirements should not target persons or undertakings for the elimination of pollution that they did not contribute to produce.¹⁴⁷ In the *Standley* case, for instance, the Court of Justice indicated that farmers are not obliged to bear all the costs of pollution by nitrates, but only those caused by their activities, so it is up to authorities to take account of the other sources of pollution and, having regard to the circumstances, avoid imposing on farmers unnecessary costs of eliminating pollution.¹⁴⁸

5. Sustainable development

The international principle of sustainable development is among the “objectives” of the EU both in its internal and external action,¹⁴⁹ thereby framing it as a foundation for EU action in general, rather than restricting its use to the development of EU environmental law.¹⁵⁰ In addition, sustainable development is specifically referred to as a “principle” in the preamble of the TEU,¹⁵¹ but notably is not mentioned in the legal basis for the environmental policy of the EU.¹⁵²

While there is no Treaty definition of sustainable development, the EU defined it in few legal instruments in different ways, thus highlighting that the concept plays out differently in different contexts.¹⁵³ One of the most illuminating definitions can be

¹⁴⁴ Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

¹⁴⁵ Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743; see Jans and Vedder, n. 11 supra, 43.

¹⁴⁶ Rio Declaration, n. 129 supra, principle 16.

¹⁴⁷ Jans and Vedder, n. 11 supra, 43-45.

¹⁴⁸ Case C-293/97 *Standley* [1999] ECR I-2603, paras. 46-52. See Ludwig Kramer, “Environmental Justice in the European Court of Justice”, in *Environmental Law and Justice in Context*, ed. Jonas Ebbesson and Phoebe Okowa, (Cambridge: CUP, 2009) 195-210, 202.

¹⁴⁹ Arts. 3(3) and (5), and 21(2)(f) TEU.

¹⁵⁰ McGillivray and Holder, n. 26 supra, 148.

¹⁵¹ TEU preamble recital 9, which reads “determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.”

¹⁵² See comments by Ludwig Kramer, “Sustainable Development in the EC”, in *Sustainable Development in International and National Law*, eds. Hans Bugge and Christina Voigt (Groningen: Europa Law, 2008) 377-396, 378-9.

¹⁵³ McGillivray and Holder, n. 26 supra, 150.

found in EU “hard law,” namely a regulation on environmental integration in development cooperation,¹⁵⁴ where sustainable development means “the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations.”¹⁵⁵ Notwithstanding this clear link between sustainable development and the carrying capacity of the earth, in most instances the connection between sustainable development and environmental protection is unclear: some authors argue that it rather provides a “continued link with economic priorities”¹⁵⁶ and is actually rarely used in the context of environmental protection.¹⁵⁷ Its most significant normative implication is probably that of introducing an inter-generational element in EU primary law.¹⁵⁸

The Court of Justice has not engaged in defining the legal implications of sustainable development: in a case concerning the legal value of the fifth Environmental Action Programme titled “Towards Sustainability,”¹⁵⁹ the Court limited itself to assert the non-legally binding nature of the EPA, failing to explain how the objective of high level of environmental protection can contribute to operationalizing sustainable development.¹⁶⁰ In another case concerning nature protection, Advocate General Léger underlined that sustainable development does not mean that environmental interests should prevail necessarily and systematically over other interests protected by other policies of the EU, but emphasized the necessary balance between various interests that sometime clash, but must be reconciled.¹⁶¹ The Court itself, however, did not elaborate on this. This judicial attitude has been explained by commentators by the identification of sustainable development “with policy formation rather than as a justiciable source of rights.”¹⁶²

Conversely, high-level policy documents produced by the EU include a plethora of references and guidance on sustainable development. The Fifth Environmental Action Programme¹⁶³ quoted the definition of the 1987 Brundtland Report: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” In the lead up to the 2002 World Summit on Sustainable Development which emphasized sustainable development in terms of “the interdependent and mutually reinforcing pillars of economic development, social

¹⁵⁴ Lee, *EU Environmental Law*, n. 23 supra, 32.

¹⁵⁵ Art. 2 of Regulation (EC) No 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries [2000] OJ L288/6. This definition is singled out by McGillivray and Holder, n. 26 supra, 150 and Kramer, “Sustainable Development in EC Law”, n. 151 supra, 384.

¹⁵⁶ McGillivray and Holder, n. 26 supra, 149.

¹⁵⁷ Kramer, “Sustainable Development in the EC”, n. 151 supra, 378-9.

¹⁵⁸ McGillivray and Holder, n. 26 supra, 148.

¹⁵⁹ Case C-142/95P, *Associazione degli Agricoltori della provincia di Rovigo and Others v Commission* [1996] ECR I-6669

¹⁶⁰ McGillivray and Holder, n. 26 supra, 151.

¹⁶¹ Case C-371/98 R v. *Secretary of State for Environment, Transport and the Regions, ex parte First Corporate Shipping* [2000] ECR-I 9235.

¹⁶² McGillivray and Holder, n. 26 supra, 151.

¹⁶³ Commission, *Towards Sustainability: A European Programme of policy and action in relation to the environment and sustainable development* [1993] OJ C138/5; see comments by Kramer, “Sustainable Development in the EC,” n. 151 supra, 388.

development and environmental protection,”¹⁶⁴ the EU adopted its own Sustainable Development Strategy.¹⁶⁵ The Strategy aimed at providing a “long-term vision that involves combining a dynamic economy with social cohesion and high environmental standards” and ensuring that all policies “have sustainable development as their core concern.” The latter endeavor was supported by a commitment by the Commission to carry out extended impact assessment for all major policy proposals with regard to the tradeoffs between the economic, social and environmental dimensions of sustainable development.¹⁶⁶ According to Kramer, the Strategy mainly served to focus attention to a “new approach to policy-making” characterized by improvement of policy coherence, increased use of market-based approaches, investment in science and technologies, and greater involvement of citizens and business.¹⁶⁷

The adoption of the EU Sustainable Development Strategy marked the beginning of a policy process that has continued until today, with ongoing monitoring of the implementation of the Strategy and its periodic update. A Renewed Strategy was adopted in 2006, emphasizing sustainable development as “safeguarding the earth's capacity to support life in all its diversity,” “based on the principles of democracy, gender equality, solidarity, the rule of law and respect for fundamental rights, including freedom and equal opportunities for all,” “the continuous improvement of the quality of life and well-being on Earth for present and future generations,” and the promotion of “a dynamic economy with full employment and a high level of education, health protection, social and territorial cohesion and environmental protection in a peaceful and secure world, respecting cultural diversity.”¹⁶⁸ Thus the Renewed Strategy emphasized the multiplicity of the objectives of sustainable development, as well as combining several of the EU overarching values, as well as some of the EU environmental law principles (notably, precaution and polluter pays). A new EU Strategy is currently in the making, once again in parallel with international negotiations for a UN Summit assessing sustainable development twenty years after the Rio Conference on Environment and Development. In line with international discussions on the green economy,¹⁶⁹ as a way to turn the challenges of the global financial, food and climate crises into opportunities, EU policy on sustainable development emphasizes a shift towards a low-carbon and resource-efficient economy, eco-innovation and smart investment.¹⁷⁰ Interestingly, the Sustainable Development Strategy process was undertaken separately from and in parallel with that of the so-called Lisbon Strategy, a ten-year

¹⁶⁴ WSSD Plan of Implementation, UN. Doc. A/CONF.199/20, Resolution 2, Annex, para. 2.

¹⁶⁵ Commission, A Sustainable Europe for a Better World. A European Union Strategy for Sustainable Development, COM(2001) 264; and Goteborg European Council Conclusions (15-16 June 2001). This was complemented by Commission, Towards a Global Partnership for Sustainable Development, COM(2002) 82, on the external dimension.

¹⁶⁶ Commission Communication on Impact Assessment, COM (2002) 276.

¹⁶⁷ Kramer, “Sustainable Development in the EC”, n. 151 *supra*, 389.

¹⁶⁸ European Council 10917/06, 26 June 2006.

¹⁶⁹ The green economy is one of its two main themes of the UN Conference on Sustainable Development convened by the UN General Assembly in Rio de Janeiro in June 2012 to mark the twentieth anniversary of the Rio Conference on Environment and Development, held in Rio in 1992 (see UN General Assembly, ‘Implementation of Agenda 21, the Programme for Further Implementation of Agenda 21 and the Outcomes of the World Summit on Sustainable Development’ (2009) UN Doc A/RES/64/236, paras. 20-29).

¹⁷⁰ Commission, Mainstreaming Sustainable Development into EU Policies, COM(2009)400; Environment Council Conclusions, “Towards Sustainability: Eco-efficient economy in the context of the post-2010 Lisbon Strategy and EU Sustainable Development Strategy” (October 2009).

strategy launched by the European Council in 2000 focusing on growth and jobs with a view to making the EU the world's most dynamic and competitive knowledge-based economy. The original EU Sustainable Development Strategy was thus conceived as an additional, green pillar to the Lisbon Strategy, which was otherwise solely concentrated on economic and social issues. Recently the EU developed a successor to the Lisbon Strategy – the “Europe 2020” Strategy for smart, sustainable and inclusive growth – which, among other things, specifically includes climate change and energy objectives.¹⁷¹ Notwithstanding a certain overlapping, the Europe 2020 Strategy and the future Sustainable Development Strategy appear set to remain two separate policy processes, with the former being at the level of heads of State and government, and the latter at that of the Environment Council.

Overall, views on the role of sustainable development in EU environmental law remain divided. Lee significantly underscores the potential of sustainable development to stimulate debate in the EU, privileging participatory processes to allow the balancing of different interests where environmental protection competes with other imperative public interests.¹⁷² Conversely, Kramer criticizes the inflationary use of sustainable development by the EU as a separate concept from environmental protection, that is not accompanied by systematic attempts to measure the ability of self-proclaimed sustainable measures to comply with environmental objective.¹⁷³

6. Environmental Integration

While environmental integration is considered a component of the international principle of sustainable development,¹⁷⁴ in EU law environmental integration can be seen as a precursor of sustainable development.¹⁷⁵ Environmental integration is a mechanism for the operationalization of sustainable development,¹⁷⁶ as well as a means to contribute to the achievement of the prevention principle.¹⁷⁷

Environmental integration is included among the general principles of EU law and framed in clearly mandatory wording. Its rationale lies in the realization that progress in the environmental field by itself is not sufficient and may be countered by developments in other policy fields that disregard environmental protection requirements.¹⁷⁸

According to Article 11 TFEU, environmental integration entails that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.” The “requirements” that are the object of this obligation are those included in Articles 2 and 191 TFEU, namely the objectives,

¹⁷¹ Commission, Europe 2020: A European Strategy for Smart, Sustainable and Inclusive, Growth, COM(2010)2020; European Council conclusions (17 June 2010).

¹⁷² Lee, *EU Environmental Law*, n. 23 supra, 47.

¹⁷³ Kramer, “Sustainable Development in the EC”, n. 151 supra, 391-393.

¹⁷⁴ See Principle 13 of the Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment, UN. Doc. A/Conf.48/14/rev.1, 1972). Sands, n. 3 supra, 253.

¹⁷⁵ McGillivray and Holder, n. 26 supra, 151, fn. 81.

¹⁷⁶ Ibid., 152, on the basis of Advocate General Léger opinion in Case C-371/98, n. 137 supra, stating that “Integration of the environmental dimension is thus the basis of the strategy of sustainable development;” and Kramer, “Sustainable Development in the EC”, n. 151 supra, 388 on the basis of the Fifth Environmental Action Programme.

¹⁷⁷ Dhondt, n. 139 supra, 106.

¹⁷⁸ Holder and Lee, n. 22 supra, 164.

principles and criteria of the EU environmental policy discussed in section 4 above.¹⁷⁹ Environmental integration is to occur into all policies of the EU,¹⁸⁰ internal and external ones, both at the stage of the framing of these policies (“definition” therefore includes every stage of the EU legislative processes –definition of policy objectives, as well as preparation, proposal and adoption of policies and legislation, as well as their revision); and at the stage of their “implementation” (which includes the adoption of further implementing acts, adoption of decisions outside the legislative process, and enforcement).¹⁸¹

Environmental integration therefore functions as a requirement for legislative action, as well as an interpretative tool of primary and secondary legislation outside the environmental field (external integration),¹⁸² which requires that the environmental objectives, principles and criteria are “applied” in other policy areas in the same way as they must be applied in the environmental policy: that is, that other policy areas must “pursue” the environmental objectives, “aim at” or “be based on” the environmental principles, and “take account of” the environmental criteria.¹⁸³ Thus, it resulted in the application of the precautionary principle outside the environmental sphere, in the area of the protection of public health,¹⁸⁴ and of the prevention and high level of protection principle in the area of agriculture.¹⁸⁵ The requirement also entails that EU environmental law itself is interpreted broadly, in light of the environmental objectives, principles and criteria of art. 191 TFEU, even when they are not explicitly incorporated in the specific piece of secondary legislation at stake¹⁸⁶ (internal integration).

It also appears clear that this requirement does not assign priority to environmental concerns over other objectives of the EU, but rather imposes a general obligation on EU institutions to reach an integrated and balanced assessment of all the relevant environmental aspects, and that the resulting decision respects the principle of proportionality – that the policy or action does not go beyond what is strictly necessary for the protection of the environment.¹⁸⁷ Overall, the environmental integration requirement has an *amplifying* effect of EU environmental policy, in that it requires the systematic pursuance of environmental objectives, principles and criteria in all EU policies and actions.¹⁸⁸

As to the legal implications of Article 11 TFEU, in the opinion of Advocate General Jacobs, environmental integration “is not programmatic but imposes legal obligations”, according to which specific account must be taken of environmental

¹⁷⁹ Jans and Vedder, n. 11 supra, 17.

¹⁸⁰ Ibid.

¹⁸¹ Dhondt, n. 139 supra, 45-53.

¹⁸² Jans and Vedder, n. 11 supra, 17.

¹⁸³ Dhondt, n. 139 supra, 84.

¹⁸⁴ Jans and Vedder, n. 11 supra, 21, on the basis of Joined Cases T-74, 76, 83, 85, 132, 137 and 141/00 *Artegodan GmbH a.o. v. Commission* [2002] ECR II-4954.

¹⁸⁵ Case C-157/96 *National Farmers Union*, n. 139 supra.

¹⁸⁶ Dhondt, n. 139 supra, 179, on the basis of Joined cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881; joined cases C-418/97 and C-419/97 *ARCO Chemie Nederland* [2000] ECR I-4475; and Case C-318/98 *Fornasar* [2000] ECR I-4785, where the Court held broad interpretations of EU waste legislation.

¹⁸⁷ Jans and Vedder, n. 11 supra, 17-18.

¹⁸⁸ Dhondt, n. 139 supra, 109.

concerns in interpreting Treaty provisions.¹⁸⁹ While environmental integration, therefore, is not merely an enabling clause, the extent to which it can successfully be invoked to review the validity of EU measures is limited to very exceptional cases, and in all events the review may differ from one case to the next (depending on which specific “environmental requirement” should be integrated).¹⁹⁰ Indeed, in disputes over lawfulness of an ozone depletion regulation,¹⁹¹ the Court of Justice held that European institutions enjoy a wide margin of appreciation in ensuring respect of the Treaty environmental objectives and principles, and as a result the EU judiciary can only check whether there is a *manifest error of appraisal* regarding the conditions for the application of Treaty objectives, given the need for institutions to strike a balance between certain objectives and principles and the complexity of the implementation of these criteria. Such error can be assessed based on the motivation that EU institutions have to provide for each legal act,¹⁹² which should demonstrate that the institution has chosen a policy that facilitates or encourages environmental protection, or where this was not possible, the least environmentally damaging way of achieving a policy-specific objective.¹⁹³ It should be also noted that the absence of reasons or inadequate reasons are *per se*, as an infringement of an essential procedural requirement, grounds for annulment of a Union act.¹⁹⁴

The requirement of environmental integration has indeed resulted in significant legislative developments, both in terms of “greening” other areas of EU law (such as the Common Agricultural Policy, Common Fisheries Policy, Common Transport Policy)¹⁹⁵ as well as in the recourse to an “integrationist” approach in the development of EU environmental law (relying, for instance, on environmental impact assessment, strategic environmental assessment, and integrated pollution prevention and control).¹⁹⁶ Nonetheless, its actual fulfilment still seems to remain elusive.¹⁹⁷

Environmental integration has been significantly felt also at the institutional level.¹⁹⁸ A high-level policy process was launched in 1998 by the European Council (Cardiff Process) by requiring each EU institution to participate in an environmental integration joint action. Sectoral Council formations were to integrate environmental considerations into their respective activities by reviewing existing policies to assess whether the environmental dimension was properly integrated, and developing strategies for action in key areas, priority actions as well as mechanisms for monitoring implementation. The Commission undertook to carry out detailed

¹⁸⁹ Opinion Advocate General Jacobs in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paras. 231-232.

¹⁹⁰ Jans and Vedder, n. 11 supra, 20-21, who argue that environmental policy objectives and principles should be more forcefully integrated than environmental policy criteria.

¹⁹¹ Case C-341/95 *Gianni Bettati* [1998] ECR I-4355, especially paras. 32-35; and Case C-248/95 *Safety Hi-Tech v S&T Srl* [1998] ECR-4301, especially paras. 34-37; and Opinion Advocate General Leger in Case C-341/95 and Case C-248/95 [1998] ECR I-4304. See also Dhondt, n. 139 supra, 144-147.

¹⁹² Art. 296 TFEU.

¹⁹³ Dhondt, n. 139 supra, 91-98.

¹⁹⁴ *Ibid.*, 175-177. Art. 263 TFEU.

¹⁹⁵ For a succinct assessment, see Kramer, “Sustainable Development in the EC,” n. 151 supra; for a more detailed assessment, Dhondt, n. 139 supra, Part III.

¹⁹⁶ McGillivray and Holder, n. 26 supra, 154.

¹⁹⁷ Kramer, “Sustainable Development in the EC,” n. 151 supra, 393.

¹⁹⁸ McGillivray and Holder, n. 26 supra, 154, argue that it has been “mostly” felt at the institutional level.

environmental impact assessments of new proposals, as well as review existing policies in light of environmental integration, and the Parliament was to review its own organizational arrangements and set priorities for environmental integration. The European Council was expected to review progress.¹⁹⁹ A stocktaking exercise of the Cardiff process in 2004, however, already noted the need to “revitalize” the process, thus implicitly acknowledging its limited impacts.²⁰⁰ While the Cardiff process was eventually considered “defunct,”²⁰¹ impact assessment continues to be used by the Commission as an integrated approach to assess the potential impacts of new legislation or policy proposals in economic, social and environmental fields, on the basis also of consultation with stakeholders. This has been crystallized in an inter-institutional “Common Approach” among the Commission, the Council and the Parliament,²⁰² thus ensuring impact assessments not only of Commission proposals but also of substantive amendments by the European Parliament and Council. Ultimately, environmental integration has “strongly influenced the style and possibly also the content of policy making” at the EU level,²⁰³ possibly to a larger extent at the procedural level,²⁰⁴ and still requires sustained efforts to be fully realized. Its influence is also significant in relation to the EU external relations, as evidenced by the insertion of several environmental integration clauses in cooperation and trade agreements between the EU and third countries, the conduct of sustainability impact assessment of trade agreements, and the consideration of environmental requirements in the definition and implementation of legislation on external funding.²⁰⁵

7. Conclusions

EU Environmental law is certainly an interesting object of study both as a possible source of inspiration for other States and regional organizations, and for its impacts on the development and implementation of international environmental law. EU environmental law has been a testing ground for principles and innovative regulatory techniques, and has been increasingly marked by further experimentalism, harnessing the pluralism across Member States, different levels of government as well as different groups of stakeholders.²⁰⁶

Nonetheless, significant challenges face EU environmental law. While the EU continues to use its domestic and external legislative action to support the implementation of international environmental law and influence its development, it is not yet possible to assert that these complex strategies have yielded positive results.

¹⁹⁹ Commission Communication, Partnership for Integration, COM(1998) 333.

²⁰⁰ Commission Communication, Integrating Environmental Considerations into Other Policy Areas - A Stocktaking of the Cardiff Process, COM(2004) 394.

²⁰¹ Kramer, *EC Environmental Law*, n. 85 supra, 395.

²⁰² ['Common Approach to Impact Assessment'](#) (November 2005)

²⁰³ Holder and Lee, n. 22 supra, 167.

²⁰⁴ McGillivray and Holder, n. 26 supra, 154. See also Martin Hession and Richard Macrory, “The Legal Duty of Environmental Integration: Commitment and Obligation or Enforceable Rights?”, in *The Transition to Sustainability: The Politics of Agenda 21 in Europe*, eds. Tim O’Riordan and Heather Voisey (London: Earthscan, 1998) 100-112.

²⁰⁵ Marín Durán and Morgera, “Towards Environmental Integration in EC External Relations?”, n. 7 supra.

²⁰⁶ Joanne Scott and Jane Holder, “Law and New Environmental Governance in the European Union”, in *Law and New Governance in the EU and the US*, eds. Joanne Scott and Gráinne de Búrca (Hart Publishing, Oxford, 2006) 215-242; and Ingmar von Homeyer, “Emerging Experimentalism in EU Environmental Governance”, in *Experimental Governance in the European Union: Towards a New Architecture?*, eds. Charles Sabel and Jonathan Seitlin (Oxford: OUP, 2010) 121-150.

The little success of the EU strategy at the Copenhagen Climate Change Conference in 2009, for instance, has provided a hard lesson for the EU.²⁰⁷ Internal shortcomings also undermine the credibility of the EU as a model and global actor. One major challenge is certainly the problematic “implementation gap,” that is the continuous lack of compliance with and enforcement of EU environmental law by the Member States.²⁰⁸ Another is the “appalling” lack of data on the environment, in particular lack of ex-post evaluation of effectiveness of existing measures, which leads Kramer to conclude that the EU environmental policy is based on assumptions rather than hard facts.²⁰⁹ Finally, the “structural imbalance concerning access to courts” in environmental matters both at the level of national courts and of EU judiciary, particularly for environmental NGOs concerned with environmental damage,²¹⁰ does not reflect well on the EU as a self-proclaimed environmental leader. Whether the EU will succeed in gradually transforming these challenges in opportunities for further innovation is yet another reason to continue to study the evolution of EU environmental law.

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²⁰⁷ Commission Staff Working Document, 2009 Environment Policy Review, SEC(2010)975, 3, where it is stated that “The results in Copenhagen fell short of the European Union’s goal...”.

²⁰⁸ Lee, *EU Environmental Law*, n. 23 supra, ch. 3; Jans and Vedder, n. 11 supra, ch. 4.

²⁰⁹ Kramer, “Sustainable Development in the EC”, n. 151 supra, 393.

²¹⁰ Kramer, “Environmental Justice in the European Court of Justice”, n. 147 supra, 209-210. This is based on a restrictive interpretation of the criteria for standing by the European courts (see Communication to the Aarhus Convention Compliance Committee ACCC/C/2008/32, 2008; in particular, the Compliance Committee’s Findings and Recommendations (2011) UN Doc. ECE/MP.PP/C.1/2011/4/Add.1) and the lack of progress on a 2003 legislative proposal for ensuring access to justice in environmental matters at the Member State level (Commission, Proposal for a Directive on Access to Justice in Environmental Matters, COM(2003) 624).

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